1980 July 3

[TRIANTAFYLLIDES, P., DEMETRIADES, SAVVIDES, JJ.]

MICHAEL HJIPANAYI TOFAS AND ANOTHER,
*Appellants-Defendants,*

*v.*

AGLAIA AGATHANGELOU,
*Respondent-Plaintiff.*

(*Civil Appeal No.* 5790).

*Practice—Trial of action—Adjournment—Discretion of trial Court—Principles on which Court of Appeal will intervene with exercise of such discretion—Vital defence witness failing to appear allegedly due to illness—Application for adjournment to enable him to attend—Said witness not summoned but a witness who would appear even without a summons—Refusal to adjourn caused injustice to the defendants—Whereas any injustice caused to the plaintiff could be remedied by an order of costs.*

*Court of Appeal—Discretion—Judicial discretion—Discretion to adjourn trial—Review of exercise of—Principles applicable.*

In the course of the continued hearing of the evidence for the defence Counsel for the appellants-defendants applied for an adjournment of the hearing on the ground that a witness for the defence could not attend the Court due to illness and that his evidence was vital for the decision in this case. The witness in question was to give evidence at the previous hearing of the case but he failed to attend and the hearing was adjourned mainly for the purpose of enabling the defence to call him as witness.

On neither occasion was the said witness summoned in accordance with the Rules but Counsel for the appellants informed the trial Court that a letter was sent to him and he said that he would attend on the date of the hearing. The trial Judge refused to accede to the application for the adjournment, proceeded with the hearing of the case and gave judgment for the respondent-plaintiff.

*Upon appeal by the defendants:*

*Held*, that the adjournment of a proceeding is a matter within the discretion of the trial Court and this Court will be slow to interfere with the exercise of such discretion in that regard; that if the discretion has been exercised in such a way as to cause injustice to the other party then the proper course for the Court of Appeal is to ensure that the matter is further heard; that the witness concerned appears, prima facie, to have been an important witness for the case of the appellants and the result of the refusal of the trial Judge to adjourn the case, so that he could attend and give evidence, appears to have caused an injustice to the appellants, whereas any injustice caused to the respondent could have been remedied by an order of costs against the appellants if the adjournment applied for was allowed; that, therefore, the trial Judge was wrong to refuse the adjournment; and that, accordingly, the judgment will be set aside and a retrial of the case, necessarily before another Judge, will be ordered.

*Appeal allowed. Retrial ordered.*

Cases referred to:

*Efstathios Kyriacou and Sons Ltd.* v. *Mouzourides* (1963) 2 C.L.R. 1 at pp. 1-2;

*Charalambous* v. *Charalambous* (1971) 1 C.L.R. 284 at p. 294;

*International Bonded Stores Ltd.* v. *Minerva Insurance Co. Ltd.* (1979) 1 C.L.R. 557;

*Kranidiotis* v. *The Ship Amor* (1980) 1 C.L.R. 297;

*Dick* v. *Piller* [1943] 1 All E.R. 627 at pp. 634-635;

*Priddle* v. *Fisher & Sons* [1968] 3 All E.R. 506;

*Rose* v. *Humbles (Inspector of Taxes)* [1970] 2 All E.R. 519 (and on appeal [1972] 1 All E.R. 314);

*Ottley* v. *Morris (Inspector of Taxes)* [1979] 1 All E.R. 65 at p. 68.

**Appeal.**

Appeal by defendant against the judgment of the District Court of Nicosia (Artemides, D.J.) dated the 7th December, 1977, (Action No. 7161/72) whereby it was ordered that the plaintiff is entitled to be registered as owner of a field at Klirou village.

*J. Erotocritou* with *A. Georghiades*, for the appellants.

*G. Constantinides*, for the respondent.

*Cur. adv. vult.*

TRIANTAFYLLIDES P. read the following judgment of the Court. This is an appeal from the judgment of the District Court of Nicosia, in action No. 7161/72, by virtue of which judgment was given in favour of the respondent, as the plaintiff, and against the appellants, as the defendants, in relation to the ownership of a field, which is the subject matter of the said action.

At the commencement of the hearing of this appeal counsel for the appellants argued first a ground of appeal to the effect that the trial Court refused on November 19, 1977, an adjournment applied for by the appellants so that a vital witness of theirs could be called to give evidence.

Without hearing counsel for the appellants in respect of the other grounds of appeal we heard counsel for the respondent in relation to the complaint of the appellants that they were wrongly refused an adjournment on November 19, 1977, and we have reserved our judgment, in this connection, until today.

The relevant part of the record of the trial in relation to the aforementioned refusal of an adjournment reads as follows:-

"*Georghiades*:- Your Honour, our next witness, Foutris, is not available. I have just been informed by the attorney of the defendants, Mr. Christofis Hji-Panayi Ttofas, that he is ill and he told him last night that he would be unable to come because he was going to see his doctor. We have not summoned this witness, Your Honour, because, Your Honour, on the 3rd of this month he said that he would be here on the date of the hearing and also a letter was sent to him. In the circumstances, as we believe that his evidence will be vital for the decision in this case, we would apply for an adjournment.

*Constantinides*:- I object, Your Honour. I have it from my client that this man went to plough his fields today, from what I have heard, not that he is ill, and besides if he was ill, they had to produce the relevant medical certificate.

*Court*:- On the 1st October, 1977, I was again informed by Mr. Georghiades that this witness, namely Foutris, who is supposed to be a vital witness for the case of the defendants, was to give evidence, although he was not

summoned, and, of course, he again did not attend on the 1st October, 1977. I intimated to Mr. Georghiades—and it is on record—that the witnesses should be summoned especially when they are supposed to be vital witnesses to the case. Today, and that is to say more than 50 days from 1st October, 1977, this witness has not again been summoned to attend today. He has not attended and an adjournment is prayed for in view of the fact that advocates have information from their client that he is ill. On the contrary, Mr. Constantinides says that his information is that the witness is not ill and he is working in his fields. Of course, since the witness has not been summoned, he is not answerable in Court for his non attendance but in view of what I have said earlier, I do not think that I should accede to the application for adjournment and it is therefore refused."

The relevant part of the record of the proceedings on October 1, 1977, to which the trial Judge has referred in refusing an adjournment on November 19, 1977, reads as follows:-

"*Georghiades*:- I have another witness, i.e. Foutris, who has not come today.

*Court to Mr. Georghiades*:- I see that you have not summoned him.

*Georghiades*:- I have not summoned him because he promised to be here and he is not here. But I also apply that the L.R.O. clerk who gave evidence be recalled and further examined by me because I entered an appearance on behalf of defendant No. 2 after the hearing of the case had commenced.

*Constantinides*:- I object to this, Your Honour. There is no reason once extensive evidence was given.

*Court*:- In view of the fact that the time now is 12.10 p.m. and since the defence will call another witness who has not been summoned for today, I shall adjourn the case for ruling on the application of Mr. Georghiades and continuation of the hearing. As I am sitting on the 3rd October, 1977, in the Assize Court bench, I cannot give a definite date for the continuation of the hearing

of this action now. I shall fix the case to be brought up to me on 3.11.77 when a new date will be fixed for hearing."

The question of whether the Supreme Court can interfere on appeal with the exercise of the judicial discretion of a trial judge in refusing an adjournment has been examined in a number of cases decided by this Court:

In *Efstathios Kyriacou and Sons Ltd.* v. *Mouzourides*, (1963) 2 C.L.R. 1, O'Briain P. stated the following (at pp. 1–2):–

"The second ground is that 'the refusal of the trial Judge to grant the adjournment was not justified in the circumstances and thus a miscarriage has been occasioned at the trial and consequently the appellants pray for a new trial to be ordered'. The allegation is that the Judge should have acceded to Mr. Clerides' application to adjourn the trial on the ground stated by him and that failure to do that was clearly an improper use of his judicial discretion.

There is no controversy about the fact that he did have in this matter a judicial discretion. Secondly we should be satisfied that he did use that discretion in a judicial manner as the law provides. Whether or not we agree with the particular application of it is not the issue.

The Court is unanimously of the opinion that not merely did he have discretion and that he applied it after a careful and patient consideration of the whole matter but this Court agrees that what he did was the right course and it would have done the same thing in the same circumstances. There is no ground whatever for suggesting, as the defendants do in this Court, that they did not get a patient and proper judicial hearing from the learned trial Judge."

In *Charalambous* v. *Charalambous*, (1971) 1 C.L.R. 284, Josephides J. said (at p. 294):–

"To sum up, although the adjournment of a hearing by a trial Court is a matter, prima facie, for the discretion of that Court and an exercise of that discretion will not be interfered with by an appellate Court in normal circumstances, if the discretion has been exercised in such a way as to cause what can properly be regarded as an injustice to any of the parties affected, then the proper course for

an Appellate Court to take is to ensure that the matter is further heard."

Also, in *International Bonded Stores Ltd.* v. *Minerva Insurance Co. Ltd.*, (1979) 1 C.L.R. 557, and in *Kranidiotis* v. *The Ship Amor* (1980) 1 C.L.R. 297, the principles which should guide a trial judge in granting or refusing an adjournment were fully expounded and we will not repeat them all over again.

In *Dick* v. *Piller*, [1943] 1 All E.R. 627, Croom-Johnson J. said (at pp. 634-635):-

"Although this Court has power to interfere with the judge's decision in regard to the granting of an adjournment, it will refrain from doing so unless it appears that such discretion has been exercised in a way which shows that all necessary matters have not been taken into consideration: *Jones* v. *S.R. Anthracite Collieries, Ltd.*[1]. In that case, in the absence of any reason being stated for refusing to allow an adjournment and there being no evidence upon which a refusal could properly be based, this Court allowed an appeal. LORD STERNDALE, M.R., at p. 462, says:

..... this Court would not interfere if it appeared to them that such discretion had been exercised in a way which showed that all necessary matters have been taken into consideration although they might not agree with the learned county Court judge's decision.

In the same case SCRUTTON, L.J., at p. 463, says:

I should like to say in regard to the point as to whether this Court has ever interfered with the decision of a county Court judge in regard to an adjournment that my impression ..... is that this Court has frequently interfered with the decisions of County Court and High Court judges in regard to the question of 'adjournment', because the whole object of this Court and every Court should be

1. [1920] 124 L.T. 462.

to do justice between the parties without dealing with technical objections.

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On the question of interference generally with the exercise of discretion by a High Court judge, ATKIN, L.J., in *Maxwell* v. *Keun*[1], is reported, at p. 653, as having said:

> The other point that was made by the defendants was that this was a discretionary order, and that the Court of Appeal ought not to interfere with the discretion of the learned judge. I quite agree the Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned judge on such a question as an adjournment of a trial, and it very seldom does do so; but, on the other hand, if it appears that the result of the order made below is to defeat the rights of the parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the Court has power to review such an order, and it is, to my mind, its duty to do so."

The case of *Dick*, *supra*, was followed in *Priddle* v. *Fisher & Sons*, [1968] 3 All E.R. 506, and in *Rose* v. *Humbles*, [1970] 2 All E.R. 519 (and on appeal [1972] 1 All E.R. 314).

In *Ottley* v. *Morris* (Inspector of Taxes), [1979] 1 All E.R. 65, Fox J. said the following (at p. 68):-

> "Prima facie, the adjournment of a proceeding is a matter within the discretion of the tribunal, and is a matter which will not be interfered with by an appellate Court. But, if the discretion has been exercised in such a way as to cause what can properly be regarded as an injustice to a party, then the proper course for an appellate Court to take is to ensure that the matter is further heard: see (*Rose* v. *Humbles* (*Inspector of Taxes*)[2]."

In the present case we have been satisfied that the trial judge was wrong to refuse the adjournment applied for on November 19, 1977; the witness concerned appears, prima facie, to have been an important witness for the case of the appellants and

1. [1928] 1 K.B. 645.
2. [1970] 2 All E.R. 519.

the result of the refusal of the trial judge to adjourn the case, so that he could attend and give evidence, appears to have caused an injustice to the appellants, whereas any injustice caused to the respondent could have been remedied by an order of costs against the appellants if the adjournment applied for was allowed.

The trial judge seems to have taken it for granted that the witness in question did not attend because he was not summoned, whereas, as it appears from the material before us, he was a witness who would have attended even without having been summoned, and, in all probability, he did not attend on the date in question because, as stated to the trial Court, by counsel for the appellants, he was indisposed.

In the light of all relevant considerations we have decided that the proper course is to set aside the judgment of the trial judge on the ground that the adjournment applied for on November 19, 1977, so that a further witness for the appellants could be heard, was wrongly refused, and, we, therefore, order that there should be a retrial of the case, necessarily before another judge.

As regards costs the respondent should pay to the appellants the costs of this appeal, and the costs of the first trial should be costs in the cause in the new trial.

*Appeal allowed. Retrial ordered. Order for costs as above.*